Monarch Water Systems, Inc. *and* Richard Allen Jones. Case 9-CA-19065

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 6 July 1983 Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, for the reasons set forth below, and to adopt the recommended Order as modified.[2]

In affirming the finding that the Respondent violated Section 8(a)(1) by discharging Richard Jones, it is necessary to clarify the basis on which the Board adopts the judge's conclusion that the discharge was directed against protected concerted activity. The judge found that the Respondent dismissed Jones because Jones had participated in a Department of Labor compliance investigation and because its president, John Glaser, believed Jones worked together with former employee Roger Ellis in instigating the investigation. In so finding, the judge reasoned that there were two bases on which to conclude Jones was discharged for his concerted activity. First, the judge relied on the constructive concerted activity doctrine followed in *G.V.R., Inc.*, 201 NLRB 147 (1973), to conclude that Jones' individual participation in the wage law compliance investigation constituted concerted activity within the meaning of Section 7. Second, the judge relied on what was Glaser's belief that Jones joined Ellis in instigating the investigation.

We find it unnecessary to decide whether Jones' participation in the compliance investigation in fact constituted concerted activity. The perceived joint participation by Jones and Ellis in instigating the compliance investigation falls well within the meaning of Section 7 of concerted activity undertaken for mutual aid or protection. Accordingly, Glaser's dismissal of Jones, based on his belief[3] that Jones acted with Ellis[4] for such purposes, is action directed against protected concerted activity. Glaser testified that he was concerned with employees' talking to Ellis about company business, that he knew Ellis and Jones were friends, that he specifically told Jones not to talk to Ellis about matters relating to company business, and that he believed Ellis was involved in the instigation of the compliance investigation. Additionally, the noncompliance letter the Department of Labor sent to the Respondent immediately prior to Jones' dismissal specifically names Ellis and Jones, among others, as employees entitled to backpay. Accordingly, we adopt the judge's finding that Glaser dismissed Jones in violation of Section 8(a)(1) based on Glaser's belief that Jones and Ellis acted in concert in instigating the compliance investigation.

We also adopt the judge's conclusion that Glaser's threat to Jones and fellow employee Wayne Wright to restrain them from participating in the compliance investigation was a threat against engaging in protected concerted activity in violation of Section 8(a)(1). Glaser's threat made at a meeting with Jones and Wright consisted of the following statement: "You guys are going to have to quit trying to get this money, because it ain't going to be enough to worry about and somebody is going to end up being dismissed over it . . . you can consider this a warning." Contrary to our dissenting colleague, Glaser's threat was not made to Jones and Wright separately and individually; rather, it was addressed to both together. In light of Glaser's previously noted belief that other individuals were cooperating in the compliance investigation (Jones and Ellis), we give his words their natural import and conclude that Glaser's threat was directed towards Jones' and Wright's participating together in the investigation. Accordingly, we find that the Respondent violated Section 8(a)(1) by its threat.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We will modify his recommended Order to provide an expunction remedy.

[3] The record does not show whether, in fact, Glaser's belief that Jones participated with Ellis in instigating the Department of Labor investigation was correct. Whether Glaser's belief was a correct one, however, is irrelevant. Threats made and actions taken by an employer against an employee based on the employer's belief the employee engaged in or intended to engage in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity. *NLRB v. Link Belt Co.*, 311 U.S. 584, 589 (1941); *Windsor Industries*, 265 NLRB 1009, 1018 (1982); *Riverfront Restaurant*, 235 NLRB 319, 320 (1978); *Crucible, Inc.*, 228 NLRB 723, 729 (1977).

[4] Although Ellis was a former employee of the Respondent at this time, he nevertheless remained a statutory "employee" within the meaning of Sec. 2(3) of the Act. *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977). Thus, so far as Glaser's perception of these events is concerned, Jones was acting in concert with another employee.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Monarch Water Systems, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following for paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way."

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN DOTSON, dissenting.

Contrary to my colleagues, I would sustain the Respondent's exceptions to the finding of both violations. With respect to their adoption of the judge's conclusion that the dismissal of Richard Jones violated Section 8(a)(1), I believe there is insufficient evidence to support a finding that Respondent President John Glaser dismissed Jones based on a belief that the Department of Labor compliance investigation was instigated by Jones and Roger Ellis acting in concert.[1] Jones admitted at the hearing that he never mentioned the investigation of Glaser and further admitted that Glaser never brought up the investigation with him. Additionally, although the Department of Labor noncompliance letter sent to the Respondent names both Ellis and Jones as employees entitled to backpay, the judge's use of this letter to support the finding that President Glaser believed that Jones and Ellis had worked together in the investigation is an erroneous one. That the letter names both as potential beneficiaries carries no necessary implication that they acted in concert, the letter nowhere affirmatively suggests that Ellis and Jones worked together during the investigation, and there is no conclusive evidence that Glaser even read the letter prior to dismissing Jones.

Accordingly, I must conclude that the evidence fails to show that Glaser's actions were based upon a belief that Jones and Ellis participated together in the compliance investigation. Thus, there is no basis for concluding that Glaser dismissed Jones in violation of Section 8(a)(1) because of his belief that Jones had engaged in protected concerted activity.

[1] In view of this conclusion, I need not decide whether to join in my colleagues' adoption of the judge's finding that former employee Ellis is an employee within the meaning of the Act.

I also disagree with my colleagues with respect to their adoption of the judge's conclusion that Glaser's warning which he stated at the meeting with Jones and Wright constitutes a violation of Section 8(a)(1). Although the statement was made when both Jones and Wright were present at the meeting, there is nothing in the statement itself warning Jones and Wright against speaking together with the Department of Labor, or otherwise cooperating together in an attempt to obtain wages they felt were impermissibly withheld from them. The warning was not made to them jointly, but instead individually and thus in no way threatened against engaging in concerted activity. Accordingly, I would also dismiss the allegation that through Glaser's statement the Respondent violated Section 8(a)(1), and would therefore dismiss the complaint in its entirety.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any employee because he has participated in an investigation by any governmental agency concerning his hours of work, rates of pay, or other conditions of employment, or because he has given information to, cooperated with, or complained about any such matters to a governmental agency having jurisdiction in such matters.

WE WILL NOT threaten employees with discharge or discipline because they participate in such an investigation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Richard A. Jones immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful discharge of Richard A. Jones and notify him in writing that this has been done and

that the discharge will not be used against him in any way.

MONARCH WATER SYSTEMS, INC.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Dayton, Ohio, on May 5, 1983, on the General Counsel's complaint which alleged, principally, that on November 18, 1982, the Respondent discharged Richard Allen Jones[1] because he had engaged in protected, concerted activity, and therefore the Respondent violated Section 8(a)(1) of the National Labor Relations Act.

The Respondent generally denied that it committed unfair labor practices and affirmatively contends that Jones was discharged for cause.

On the[2] record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is an Ohio corporation engaged in the design, manufacture, and installation of water treatment equipment for industrial and commercial use. The Respondent annually receives directly from points outside the State of Ohio, goods and materials valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

During the material time, John Glaser was the president and chief operating officer of Respondent's business. As he testified, the Company employed three to four shop people and three to four office employees, including his mother, who was the bookkeeper. In its business of installing water treatment equipment, the Respondent had jobs in various States including Indiana, Kansas, and New Jersey. Some were on military installations which, among other things, required compliance with the Federal prevailing wage statutes.

In September 1982, Glaser was contacted by David W. Huster, a compliance officer with the Department of Labor, Wage and Hour Division, whose office was physically located about half way between Dayton and Cincinnati. At that time, according to Glaser, he was under the impression that the investigation by the Wage and Hour Division was strictly routine, because his Company had had a number of Government contracts.

Glaser also testified that it was his opinion the investigation had probably been instigated by former employee Roger Ellis: "Roger Ellis had filed or I had suspected Roger Ellis filing several complaints with several different agencies. . . . So I presumed one more agency wouldn't bother him." At the time of the events here, however, Ellis was no longer an employee, having been discharged by Glaser some several months previously.

In early November, Jones, fellow employee Wayne Wright, and their supervisor, Bobby Estes, were on their way to Indianapolis to work on a job when a tire on the trailer went flat. There ensued a dispute between Ellis and Jones concerning whether and how they ought to change the tire, Jones maintaining that what Ellis had in mind was dangerous. Notwithstanding, all three did participate in changing the tire, but on returning to Dayton, Estes brought this matter to the attention of Glaser, contending that Jones had refused to do what Estes had told him. Glaser apparently determined that the alleged insubordination was sufficient to require the discharge of Jones, and he drafted a letter to that effect dated November 5:

> I regret to inform you that your employment is not longer required. During the past months, the quality and quantity of your work has decreased. Your attitude toward Monarch is poor; and that you have not followed company procedures or orders of your supervisor.
>
> As of November 5th, your employment is terminated. Please turn in uniforms and keys, and other property in your possession that belongs to Monarch.

Glaser then talked to Jones and then, along with Jones, talked to Estes and Wright to get their versions of the event. Wright's version substantially corroborated that given by Jones, which was basically to the effect that, although Jones objected to changing the tire, he did not refuse to do so, and did in fact participate along with Wright and Estes in doing it.

During the course of this meeting, according to the testimony of Jones, Glaser said something to the effect: "You guys are going to have to quit trying to get this money, because it ain't going to be enough to worry about and somebody is going to end up being dismissed over it. . . . you can consider this a warning.

Glaser testified that he decided not to deliver the dismissal letter to Jones or to discharge him on November 5 because he feared that the Ohio Unemployment Compensation Commission would conclude that Jones' having refused to follow Estes' order was not sufficient cause for discharge. Therefore Jones would be awarded unemployment compensation.

On November 17, Huster wrote a letter to Glaser, stating the findings of his compliance review of the Respondent. He stated that on two particular projects, the Respondent had failed to comply with the Davis-Bacon Act, and that Ellis, Jones, McFaddin and Wright were entitled to backpay. (At the time, only Jones and Wright continued to be employees of Respondent.)

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[1] The name of the Charging Party is corrected to conform to his testimony.

[2] The General Counsel's Motion to correct the transcript is granted at p. 61, L. 16, "Where is Custer Station?" is corrected to read, "Where is Huster stationed?"

On November 18, the day I conclude that Glaser received the letter from Huster, Glaser wrote to Jones:

> Your employment at Monarch Water is no longer wanted. Please turn in uniforms and keys on Monday, November 22. We are holding one hundred dollars ($100.00) from your paycheck until all items are returned and verified.

B. *Analysis and Concluding Findings*

The principal issue in this matter is why Glaser discharged Jones on November 18, 1982. Glaser contends that he was motivated solely by Jones' poor work performance in recent months and testified to a litany of infractions including Jones' having been late or leaving early 26 or 28 times in the preceding 26 weeks, wearing jogging shoes instead of safety boots, taking too long for lunch and so on. The General Counsel contends that Glaser was motivated by the fact that Jones had participated in the Wage and Hour Division investigation which had resulted in a finding that the Respondent had violated the Davis-Bacon Act. I believe that it was the Wage and Hour Division investigation and Jones presumed participation in it which caused Glaser to discharge him.

Glaser was first informed of the investigation in September. At that time he was advised that it was simply routine inasmuch as the company had several government contracts. Although I believe that on November 5 Glaser did tell Jones and Wright something to the effect that they should stop trying to get their money and that the investigation could lead to dismissal, since there had been no determination the investigation was not paramount.

However, on November 18, Glaser learned that the investigation was no longer routine. The Company had been found in violation of the Davis-Bacon Act requiring payment to two current employees and two former employees.

Glaser testified, though with some equivocation, that he did not receive this letter until sometime after having sent the November 18 discharge letter dated to Jones. He stated that his mail takes 2 days from posting to delivery—even from Cincinnati or Dayton. However, return-receipts in the formal papers show that the charge and the complaint were both delivered to the Respondent the day following postage. I therefore believe that Glaser's assertion of 2-day delivery was an attempt to reinforce his testimony on a critical issue—that he did not have the Huster letter prior to discharging Jones.

I conclude not only that Glaser had the compliance letter from Huster on November 18, but that he attempted to mislead me on a material fact in this matter. From this, along with Glaser's generally negative demeanor, I conclude that his testimony is not credible.

Further, Glaser testified that Jones' poor performance for several months led him to conclude that Jones should be discharged on November 5; but he did not do so because he felt that his reasons might not withstand scrutiny from the Ohio Unemployment Compensation Commission. Glaser did not suggest anything Jones did between November 5 and 18 which would tend to change Jones' record for the worse. Glaser offered no explanation of why he felt there was sufficient cause to discharge Jones on November 18 where the same facts had been insufficient on November 5.

Finally, although Glaser testified about many areas of deficiency on Jones' part for the 2 years that he was an employee, Glaser did not explain why, in fact, Jones had not been discharged much earlier. Indeed, Glaser had discharged at least two of his six or so employees within the year previous to Jones' discharge. Although the facts surrounding those discharges are not a matter of record, it is noted that Glaser apparently had no hesitancy to discharge employees whom he felt were unproductive or for other reasons. I therefore conclude that Glaser exaggerated his contention of a poor performance by Jones for several months or prior to the discharge. Whatever Jones may have done, such was never considered to be particularly serious until the Wage and Hour investigation.

To the contrary, Jones had been an employee for 2 years, had performed at an acceptable level, and never had he been disciplined or warned about any alleged tardiness, wearing improper apparel, etc. At least there is no testimony or documentary evidence that he had. I therefore conclude that the alleged reasons for Jones' discharge were offered by Glaser as a pretext to cover the true motive for the discharge. In matters such as this, where the trier of fact concludes that the reasons given for a discharge are a pretext, they can be disregarded. Indeed, the trier of fact may infer that which Respondent seeks to hide—that the motive for the discharge is the one alleged in the complaint. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

Glaser knew Jones was a friend of Roger Ellis. Glaser admitted he told Jones that since Ellis was no longer an employee, Jones should not discuss company matters with Ellis. Glaser also admitted he believed that Ellis was the one who was behind the Wage and Hour investigation. Given these factors, and because Jones was named as one of the individuals due backpay in the November 17 letter from Huster, I conclude that Glaser believed that Jones had been involved in the Wage and Hour investigation, probably in concert with Ellis. And I conclude it was the investigation generally, and Jones' perceived involvement, that caused Glaser to discharge him on November 18, 1982.

The next question, is whether or not the activity for which Jones was discharged is protected by Section 7. I conclude it is even without evidence that Jones acted in concert with other employees. In *G.V.R. Inc.*, 201 NLRB 147 (1973) (Chairman Miller dissenting), the Board stated:

> [A]n employee covered by a federal statute governing wages, hours and conditions of employment who participates in a compliance investigation of his employer's administration of a contract covered by such a statute . . . is engaged in concerted activity for the mutual aid and protection of all the employers employees similarly situated.

In addition, from the admissions of Glaser, it is clear that he believes Jones was involved in the investigation with former employee Roger Ellis. Since a former employee is an employee within the meaning of Section 2(3) of the Act, *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977), as far as Glaser perceived these events, Jones had been acting in concert with other employees. I accordingly conclude that Glaser discharged Jones because he engaged in concerted activity, protected by Section 7 of the Act and that the discharge of him on November 18, 1982, was violative of Section 8(a)(1).

I also credit Jones' testimony and discredit Glaser's denial concerning Glaser's threat in the November 5 meeting. I believe that Glaser in fact did tell Jones and Wright something to the effect that they should quit trying to get their money (meaning quit cooperating with the Wage and Hour Division investigation) and that the investigation might lead to a dismissal. Such is clearly a threat against employees should they pursue activity protected by the Act and was therefore violative of Section 8(a)(1).

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found above, occurring in connection with the Respondent's business set forth above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several States and lead to labor disputes burdening and obstructing commerce and the free flow thereof, within the meaning of Section 2(6) and (7) of the Act.

IV. THE REMEDY

Having found that the Respondent has committed certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action including offering Richard A. Jones reinstatement to his former job or, if that job no longer exists, to an equivalent position of employment and make him whole for any wages or other rights and benefits he may have lost as a result of the discrimination against him, in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest provided for in *Florida Steel Corp.*, 231 NLRB 716 (1962).[3]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Monarch Water Systems, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they have participated in an investigation by any Government agency concerning their wages, hours, rates of pay, or other conditions of employment, or because they have given information to, or cooperated with, or complained about any such matters to a Government agency having jurisdiction of such matters.

(b) Threatening employees with discharge should they participate in such an investigation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[5]

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Richard A. Jones to his former position of employment or, if that job no longer exists, to a substantially equivalent job, and make him whole for any losses he may have suffered in accordance with the remedy section above.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all records, reports and other documents necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of businesss copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to Respondent are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[3] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] Although the principal unfair labor practice here involves a discharge, the record does not establish a proclivity to engage in unfair labor practices. Thus the narrow injunctive relief seems appropriate. See *Hickmott Foods*, 242 NLRB 1357 (1979)

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."